NO. 87-23

Supreme Court, U.S.
FILED
JN 25 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LLOYD O. LONG, M.D., *Appellant*

v.

BRADLEY M. HARRISON, a Minor, by and through his Next Friends and Natural Parents, MICHAEL L. and MARLA K. HARRISON, and MICHAEL L. and MARLA K. HARRISON, *Appellees,*

v.

FLETCHER BELL, Commissioner of Insurance, State of Kansas, *Intervener/Appellee.*

ON APPEAL FROM THE SUPREME COURT OF KANSAS

JURISDICTIONAL STATEMENT

Jeffrey A. Mason
Counsel of Record
Vignery & Mason
214 E. 10th Street
P.O. Box 767
Goodland, Kansas 67735
(913) 899-6588

Laurin D. Quiat
Cogswell and Wehrle
3500 One United Bank Center
1700 Lincoln Street
Denver, Colorado 80203
(303) 861-2150
Attorneys for Appellant,
Lloyd O. Long, M.D.

June 25, 1987

Question Presented

Whether the Kansas Health Care Provider Insurance Act, as contained in K.S.A. Section 40-3401, et seq. (1981), is unconstitutional in that it violates the Fourteenth Amendment due process clause of the United States Constitution by depriving a physician of his constitutionally-protected property right to defend himself in Court.

TABLE OF CONTENTS

	Page
Opinions Below	*2*
Jurisdiction	2
Question Presented	3
Constitutional Provisions	3
Raising the Federal Question	3
Statement of the Case	4
The Question is Substantial	5
Conclusion	9
Appendix	10

TABLE OF AUTHORITIES

	Page
Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2702, 33 L.Ed. 2d 548 (1972)	7
Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S. Ct. 1148, 1 L.Ed. 2d 265 (1982)	8
Neely v. St. Francis Hosp., 192 Kan. 716, 391 P. 2d 155 (1964)	7
Noel v. Menninger Foundation, 175 Kan. 751, 267 P. 2d 934 (1954)	7

STATUTES

K.S.A. § 40-3401, *et seq.*	2-6

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. XIV, § 1	6
Kan. Const. Bill of Rights, § 18	7

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

—————o—————

No. _____

—————o—————

LLOYD O. LONG, M.D., Appellant,

v.

BRADLEY M. HARRISON, a Minor, by and through his Next Friends and Natural Parents, MICHAEL L. and MARLA K. HARRISON, and MICHAEL L. and MARLA K. HARRISON, Appellees,

v.

FLETCHER BELL, Commissioner of Insurance, State of Kansas, Intervener/Appellee.

—————o—————

ON APPEAL FROM THE SUPREME COURT OF KANSAS

—————o—————

JURISDICTIONAL STATEMENT

Lloyd O. Long, M.D., appeals from the final judgment of the Supreme Court of Kansas, dated March 27, 1987, holding that the provisions of the Kansas Health Care Provider Insurance Act (K.S.A. 40-3401, *et seq.)* do not deprive a health care provider of a property right, *i.e.*, the right to defend an action, or a due process right, and that the Act does not violate the Fourteenth Amendment to the United States Constitution or Section 18 of the Bill of Rights of the Kansas Constitution.

OPINIONS BELOW

The opinion of the Supreme Court of Kansas which appears in the Appendix hereto, p. 1a, *infra,* is reported at 734 P. 2d 1155 (Kan. 1987).

The Journal Entry denying Appellant's Motion for Relief from the original Journal Entry approving the settlement agreement reached between the Appellees, Appellant's insurance carrier, St. Paul Fire and Marine Insurance Company and the Kansas Health Care Stabilization Fund, dated June 16, 1986, is not reported. It is reprinted in the Appendix hereto, p. 10 a, *infra.*

JURISDICTION

The judgment of the Supreme Court of Kansas, affirming the ruling of the Sherman County District Court, was entered on March 27, 1987.

This appeal is being docketed in this Court within ninety days from the filing of the Supreme Court of Kansas opinion. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(2).

QUESTION PRESENTED

Whether the Kansas Health Care Provider Insurance Act, as contained in K.S.A. § 40-3401, *et seq.* (1981), is unconstitutional in that it violates the Fourteenth Amendment due process clause of the United States Constitution by depriving a physician of his constitutionally-protected property right to defend himself in Court.

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment, Section 1, United States Constitution

Section 18, Bill of Rights, Kansas Constitution

Kansas Statutes Annotated, § 40-3401, *et seq.* (1981)

All statutes are set forth in full in the Appendix to this Jurisdictional Statement.

RAISING THE FEDERAL QUESTION

In Appellant's Motion for Relief from Journal Entry, Appellant raised the issue that the Kansas Health Care Provider Insurance Act violated the Fourteenth Amendment due process clause of the United States Constitution. The Journal Entry entered by the District Court of Sherman County, dated June 16, 1986, held that the Kansas Health Care Provider Insurance Act did not violate the Fourteenth Amendment due process clause of the United

States Constitution, in that it did not deprive Appellant of his constitutionally-protected property rights.

The Fourteenth Amendment claim was reiterated by Appellant before the Supreme Court of Kansas. The question presented on appeal was whether the Kansas Health Care Provider Insurance Act, as contained in K.S.A. § 40-3401, *et seq.* (1981), was unconstitutional in that it violated the Fourteenth Amendment due process clause of the United States Constitution by depriving a physician of his constitutionally-protected property right to defend himself in court. The Kansas Supreme Court affirmed the district court ruling. It thus considered and expressly rejected Appellant's federal constitution claim.

STATEMENT OF THE CASE

The Appellant, Lloyd O. Long, M.D., is a physician licensed to practice medicine in the State of Kansas. Appellant has as his primary place of residence, Sherman County, Kansas.

In January, 1983, Appellant was the pediatrician for Appellee Bradley M. Harrison. As a result of Appellant's treatment of Bradley Harrison, he was sued for medical malpractice. Appellant's insurance carrier, St. Paul Fire and Marine Insurance Company, the Appellees and the Kansas Health Care Stabilization Fund, pursuant to K.S.A. § 40-3401 *et seq.* (1981), settled the lawsuit without Appellant's consent.

On June 19, 1985, the District Court of Sherman County, Kansas, entered its journal entry approving the settlement reached between the parties. On June 28, 1985, Appellant filed his Motion for Relief from Journal Entry,

claiming that K.S.A. § 40-3401 *et seq.* (1981) was unconstitutional in that it violated the Fourteenth Amendment Due Process Clause of the United States Constitution by depriving Appellant of his constitutionally-protected property right to defend himself in court. Appellant's Motion for Relief from Journal Entry was denied on June 16, 1986.

Appellant filed his Notice of Appeal to the Supreme Court of Kansas claiming that the Kansas Health Care Provider Insurance Act as contained in K.S.A. § 40-3401 *et seq.* (1981), was unconstitutional in that it violated his Fourteenth Amendment Due Process rights. On March 27, 1987, the Supreme Court of Kansas affirmed the District Court's denial of Appellant's Motion for Relief from Journal Entry, holding that the provisions of the Kansas Health Care Provider Insurance Act (K.S.A. § 40-3401 *et seq.* [1981]) do not deprive a health care provider of a property right, *i.e.*, the right to defend an action, or a due process right. The Supreme Court of Kansas held that the Act did not violate the Fourteenth Amendment to United States Constitution or Section 18 of the Bill of Rights of the Kansas Constitution.

THE QUESTION IS SUBSTANTIAL

The question as to whether the Kansas Health Care Provider Insurance Act is unconstitutional in that it seeks to deprive a physician of his Fourteenth Amendment due process right to defend himself in Court is a novel and substantial one. It is a question which appears to have never been treated before by this Court.

The Kansas Health Care Provider Insurance Act, K.S.A. § 40-3401. *et seq.* (1981), establishes insurance requirements for health care providers. The statute re-

quires every health care provider to maintain medical malpractice insurance as a condition to rendering medical services in Kansas. The Act establishes the minimum insurance coverage and also establishes the Kansas Health Care Stabilization Fund (the "Fund"). The Fund was established for the purpose of paying damages for personal injuries or death arising out of the rendering or the failure to render professional services by a health care provider. The Fund is required to pay judgments or settlements which exceed the basic liability coverage provided by private insurers for all resident health care providers. K.S.A. § 40-3403. Should a private insurer agree to settle a claim against its insured for its policy limits, the claimant and the insurance commissioner are authorized to negotiate an amount to be paid from the Fund to satisfy the balance of the claim. K.S.A. § 40-3410. If the claimant and commissioner agree upon an amount, the statute provides for a petition to be filed with the Court for approval of the agreement, and for a hearing to be held by the Court prior to approving the proposed settlement. In order to approve the settlement, the Court must find the agreement to be valid, just and equitable. K.S.A. § 40-3410. Nowhere in these procedures is the consent of the insured to the settlement required.

Section 1 of the Fourteenth Amendment to the United States Constitution provides in part that ". . . or shall any state deprive any person of rights, liberty, or property without due process of law . . ." Procedural due process contemplates that when life, liberty or property are taken by the government, it is required to act with procedural correctness. Analyzing a due process argument, the first question considered is whether there is a liberty or property

interest at stake, and if so, the second question is what "process" is due. A property interest is an interest that a person has already acquired in specific benefits. There must be a "legitimate claim of entitlement." *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2702, 33 L. Ed. 2d 548 (1972). The claim of entitlement must be found in state law. In addition, the United States Constitution requires that a state may not take away without due process what it has previously granted.

Appellant's state-created property right stems from the Constitution of the State of Kansas, Bill of Rights, Section 18. The text of Section 18 provides:

> *Justice without delay.* All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.

"Remedy by due course of law" has been defined as reparation for injury ordered by a tribunal having jurisdiction in due course of procedure, after a fair hearing. *Neeley v. St. Francis Hospital and School of Nursing, Inc.*, 192 Kan. 716, 391 P. 2d 155 (1964); *Noel v. Menninger Foundation*, 175 Kan. 751, 267 P. 2d 934 (1954). Appellant, in the case below, claimed that the procedural scheme laid out in the Act deprived him of the right to have a remedy imposed in due course of procedure after a fair and meaningful hearing for the injury to his reputation which resulted from the malpractice claim filed by Appellees.

The Kansas Health Care Provider Insurance Act acts to completely sever a physician's right to have a meaningful hearing to defend a malpractice claim against him. The Act takes "property" from the physician that he is otherwise guaranteed by the Kansas and Federal Constitutions.

Minimum procedural requirements are a matter of federal law, and may not be diminished by the fact that a state may have specified procedures that it deems adequate for determining preconditions to adverse action. A state may freely legislate regarding substance, but federal procedural requirements are inviolate. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S. Ct. 1148, 1 L. Ed. 2d 265 (1982). The Kansas legislature has attempted to establish a separate and lesser set of procedural safeguards for the Kansas Health Care Stabilization Fund. These inadequate state safeguards must give way in the face of federal due process standards.

Kansas has elected to impose financial restrictions on physicians in such a way as to subject Appellant to being branded with a malpractice label. Appellant's Fourteenth Amendment due process contention is a substantial one which has been raised on the record in this case.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

Jeffrey A. Mason
Counsel of Record
Vignery & Mason
214 E. 10th Street
P.O. Box 767
Goodland, Kansas 67735
(913) 899-6588

Laurin D. Quiat
Cogswell and Wehrle
3500 One United Bank Center
1700 Lincoln Street
Denver, Colorado 80203
(303) 861-2150
Attorneys for Appellant,
Lloyd O. Long, M.D.

June 25, 1987

APPENDIX

OPINIONS BELOW

1. SUPREME COURT OF KANSAS

No. 59,739

BRADLEY M. HARRISON, a Minor,
by and through his Next Friends and Natural Parents,
MICHAEL L. and MARLA K. HARRISON, and
MICHAEL L. and MARLA K. HARRISON,
Plaintiffs-Appellees,

v.

LLOYD O. LONG, M.D.,
Defendant-Appellant.

SYLLABUS BY THE COURT

1. "Standing to sue" means that a party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy. *Dutoit u Board of Johnson County Comm'rs,* 233 Kan. 995, 1003, 667 P. 2d 879 (1983).

2. Under the Kansas Code of Civil Procedure, a defendant has no absolute right to prevent a voluntary dismissal of the plaintiff's action unless the defendant asserts a counterclaim against the plaintiff. K.S.A. §

60-241(a). A defendant has no constitutionally protected right to require that a plaintiff's action continue for the sole purpose of allowing the defendant to vindicate himself.

3. The provisions of the Kansas Health Care Provider Insurance Act (K.S.A. § 40-3401, *et seq.* [Ensley 1981]) do not deprive a health care provider of a property right, *i.e.*, the right to defend an action, or a due process right. The Act does not violate the Fourteenth Amendment to the U.S. Constitution or Section 18 of the Bill of Rights of the Kansas Constitution.

Appeal from Sherman district court; JACK C. BURR, judge. Opinion filed March 27, 1987. Affirmed.

Laurin D. Quiat, of Cogswell and Wehrle, of Denver, Colorado, argued the cause, and Martha C. Reps, of the same firm, and Jeffrey A. Mason, of Foust and Vignery, of Goodland, were with him on the briefs for appellant.

Thomas L. Theis, of Sloan, Listrom, Eisenbarth, Sloan and Glassman of Topeka, argued the cause and Jeffrey W. Jones, of the same firm, and Derenda J. Mitchell, of Kansas Insurance Department, of Topeka, were with him on the brief for intervenor Fletcher Bell, Commissioner of Insurance.

No appearance by appellees.

The opinion of the court was delivered by:

LOCKETT, J: The appellant, Lloyd O. Long, M.D., a licensed physician, challenges the constitutionality of the Kansas Health Care Provider Insurance Act, K.S.A. § 40-3401, *et seq.* (Ensley 1981). Dr. Long contends that the Act deprived him of a property right — the right to defend himself. The district court found the Act constitutional. Dr. Long appeals.

Dr. Long is a physician licensed to practice medicine in Kansas. On June 20, 1984, Bradley M. Harrison, by and through his parents, filed a medical malpractice action against Dr. Long in Sherman County District Court. The action arose out of Dr. Long's medical treatment of Bradley in February of 1983.

After investigating the medical malpractice claim against Dr. Long, Long's insurance carrier, St. Paul Fire and Marine Insurance Company (St. Paul), determined to settle its liability rather than defend the claim against Dr. Long. St. Paul notified the Kansas Health Care Stabilization Fund (Fund) of its decision. The Fund and the claimant then entered into negotiations and reached a settlement.

The settlement was approved by the Sherman County District Court over Dr. Long's objections. Dr. Long filed a motion for relief from the journal entry contending that part of the Kansas Health Care Provider Insurance Act, which allows the Fund to settle actions over the objections of the defendant physician, is unconstitutional. The district court found the Act constitutional. Dr. Long appeals. The Fund was allowed to intervene in the appeal.

The Act was passed by the 1976 legislature as a partial response to the increasing pressure of what was termed a national medical malpractice crisis. Although repeatedly amended since its enactment, statutory references to the Act in this opinion will be to K.S.A. § 40-3401, *et seq.* (Ensley 1981), which was in effect when this cause of action arose. Under the Act, every resident health care provider, including physicians, is required to maintain a policy of professional liability insurance with a minimum liability of $100,000 per occurrence and $300,000 annual

aggregate. (After July 1, 1984, the minimum liability limit was increased to $200,000 and $600,000.) K.S.A. 40-3402(a). The Fund is responsible for paying that amount of any judgment in excess of the basic coverage of the resident health care provider. K.S.A. § 40-3403(b)(1). The resident health care providers pay an annual surcharge to the Fund to qualify for the excess coverage. K.S.A. 40-3404(a).

If a physician is sued for medical malpractice, his liability insurer initially defends the action. If the physician's basic insurer agrees to tender the limits of its coverage to settle a claim, but that claim exceeds the amount of such coverage, the insurance commissioner is authorized to negotiate with the claimant an amount in excess of the liability insurer's coverage to be paid out of the Fund. In the event the Fund and the claimant agree upon the amount of compensation to be paid by the Fund, the claimant must then file a petition in the court where the underlying action is pending for approval of the agreement. Following a hearing, the court may approve the settlement between the claimant and the Fund if the settlement is found to be valid, just, and equitable. K.S.A. § 40-3410.

1. Standing

The Fund claims that Dr. Long has no standing to appeal because, under the settlement agreement, St. Paul and the Fund are responsible for the payment to the claimant. The Fund argues that standing requires the coexistence of three factors: (1) injury in fact to the party; (2) "individuated" injury; and (3) causation in fact, citing *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 57 L. Ed. 2d 595, 98 S. Ct. 2620 (1978). The Fund maintains

that because Dr. Long is without injury, he has no standing to sue.

Standing has been called one of the most amorphous concepts in the entire domain of public law. Annot., 50 L. Ed. 2d 902, 904. The United States Supreme Court has stated that, in its constitutional dimension, standing imparts justiciability: whether the plaintiff has made out a case or controversy between himself and the defendant within the meaning of Article III of the U.S. Constitution. The court has emphasized that this is the threshold question in every federal case determining the power of the court to entertain the suit. *Warth v. Seldin,* 422 U.S 490, 498, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975).

Standing is a question of whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of jurisdiction and to justify exercise of the court's remedial powers on his behalf. *Warth v. Seldin,* 422 U.S. at 498-99. "Standing to sue" means that a party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy. *Dutoit v. Board of Johnson County Comm'rs,* 233 Kan. 995, 1003, 667 P. 2d 879 (1983). To have standing, Dr. Long must show that he personally suffered some injury and that there was some causal connection between the claimed injury and the challenged conduct.

Dr. Long argues that he has standing to challenge the constitutionality of the Act because he has sustained actual injury as a result of the settlement of the suit. He contends the settlement approved by the court resulted in an increase of his annual surcharge to the Fund by 400 percent since 1984 and, in addition, has caused injury to his reputation at the local hospitals. On future malpractice

insurance applications, he is required to report any suits that have been filed against him for malpractice and the resulting settlements of those suits. Dr. Long argues that, but for the Act, he would have had an opportunity to defend himself and present his defense to the alleged malpractice in a court of law.

Under these circumstances, Dr. Long has a sufficient stake in the justiciable controversy to obtain judicial resolution of the controversy.

2. Property Rights

Dr. Long contends that the Act deprives him of a property right — the right to defend himself in court — and since the constitution of this state has made access to the courts an entitlement, the legislature may not now deprive him of his right to defend himself by denying him such access. The Fund contends that the right to defend oneself in court is not a protected property interest.

When reviewing the constitutionality of a statute, the appellate court must presume the statute is constitutional; all doubts must be resolved in favor of the statute's validity; and before a statute may be stricken down, it must be clearly shown that it violates the Constitution. It is the court's duty to uphold the statute under challenge, if possible, rather than defeat it, and if there is any reasonable way to construe the statute as constitutionally valid, that must be done. *Lakeside Village Improvement Dist. v. Jefferson County,* 237 Kan. 106, 697 P. 2d 1286 (1985).

The Fourteenth Amendment to the United States Constitution provides that no state can "deprive any person of life, liberty, or property, without due process of law."

Section 18 of the Bill of Rights of the Kansas Constitution provides:

> **"Justice without Delay.** All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay."

When an interest involving life, liberty, and property is implicated, the right to some kind of prior hearing is mandated because of the due process considerations emanating from the Fourteenth Amendment. However, a protected due process right must encompass the type of interest recognized under the due process clause of the Fourteenth Amendment. *Sinclair v. Schroeder,* 225 Kan. 3, 8, 586 P. 2d 683 (1978).

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. *Board of Regents v. Roth,* 408 U.S. 564, 577, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972).

"Property," as that term has been construed within the constitutional guaranty against the deprivation of property without due process, includes various rights and interests, such as a cause of action, including a chose in action; contract rights, including possessory interests in a chattel under a conditional sales contract; a franchise; a future vested estate; the respective rights of income account and principal account under a trust; patent rights; trade secrets; the good will of a business; and an interest in real property. 16C C.J.S., Constitutional Law 984.

The due process clause protects vested rights only and has no reference to mere concessions or privileges which the public authorities may control, and bestow, or withhold at will. Interests which have been held not to be protected by the due process clause include actions for wrongful death, environmental concerns of a general nature, interests in the selection of a trustee, the rights of an unsuccessful bidder for government benefits, a right to a favorable advisory opinion, the right to malpractice insurance, the interests of members in a charitable society, rights in a reputation, utility rates and medical insurance rates. 16C C.J.S., Constitutional Law 985.

Dr. Long argues that Section 18 of the Kansas Bill of Rights makes justice "by due course of law" the public policy of the state; therefore, it creates a protected property right to defend oneself in court against a civil claim for damages. We do not agree.

The constitutional provision guaranteeing to every person a remedy by due course of law for injury done him in person or property means that for such wrongs that are recognized by the law of the land the court shall be open and afford a remedy, or that laws shall be enacted giving a certain remedy for all injuries or wrongs. "Remedy by due course of law," so used, means the reparation for injury ordered by a tribunal having jurisdiction in due course of procedure after a fair hearing. *Neely v. St. Francis Hospital & School of Nursing,* 192 Kan. 716, 719, 391 P. 2d 155 (1964).

The right to a cause of action has long been held to be a protected property interest. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 71 L. Ed. 2d 265, 102 S. Ct. 1148 (1982). "[T]he ... Due Process Clause has been interpreted

as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed right[s].'" 455 U.S. at 429-30.

There are no cases, however, holding that the right to defend oneself in a civil case is a protected property interest. The common law and the Kansas Code of Civil Procedure both recognize that a plaintiff has the right of action and may dismiss his complaint at law or his bill in equity unless some plain legal prejudice would result to the defendant other than the mere prospect of a second litigation upon the subject matter. A defendant has no absolute right to prevent a voluntary dismissal of the plaintiff's action unless the defendant asserts a counterclaim against the plaintiff. K.S.A. 60-241(a).

A defendant has no constitutionally protected right to require that a plaintiff's action continue for the sole purpose of allowing the defendant to vindicate himself. Under the circumstances, Dr. Long has no constitutionally protected property right to defend himself in court.

3. Due Process Rights

Dr. Long claims that he was deprived of his right to defend himself when the Act became effective. We do not agree. Neither the Fourteenth Amendment to the United States Constitution nor Section 18 of the Kansas Bill of Rights constitutionally prohibits changes in the law which affect a person's rights as they existed at common law. *State ex rel. Schneider u Liggett,* 223 Kan. 610, 613, 576 P. 2d 221 (1978). While Section 18 provides a broad field for the protection of person, property, and reputation, the

vested rights contained therein are subject to change by legislative power, where the change is reasonably necessary in the public interest to promote the general welfare of the people of the state. *Manzanares v. Bell*, 214 Kan. 589, 599, 522 P. 2d 1291 (1974).

Dr. Long claims that the right to defend oneself in court is a procedural due process right guaranteed every individual under the Fourteenth Amendment. The Fund counters that (1) if he has such right, Dr. Long waived his procedural right to object to the settlement by the Fund under his contract with St. Paul, and (2) he has no due process property right to defend himself; therefore, the Act does not deprive him of any procedural due process right.

The Act requires Dr Long to maintain professional liability insurance as a condition of rendering service in this state. Dr. Long contracted with St. Paul for the liability coverage that contained a limitation on the coverage and an agreement that his insurance company could defend or settle any claim covered by the policy without the consent of the doctor. Here, under its contract, St. Paul chose not to defend the Harrisons' claim against Dr. Long but agreed to settle its liability to the claimant within the policy limits and notified the Fund of its intention. The insurance commissioner under the Act was then entitled to negotiate an amount to be paid from the Fund as a settlement or continue to defend the action against Dr. Long. Unlike Dr. Long's contract with his liability carrier, the Act contains no explicit waiver or consent provision which allows the Fund to settle the action with the claimant without the consent of the health care provider.

The power of the State to regulate and license professions is not limited to fitness to practice, but may also

include requirements to protect and promote the public health, safety, morals, peace, quiet, and law and order. It is the public policy of the State to assure an adequate supply of health care providers and provide protection to patients who may be injured as a result of medical malpractice. Under the Act, it is the Fund, not the provider, which is responsible for paying any difference above the coverage of the liability insurance. It is, therefore, implicit in the Act that the provider relinquish his right to prevent a settlement. To allow physicians to control the defense of malpractice claims against them and reach their own decisions to continue or to settle the action would undermine the whole purpose and the financial structure of the Act.

The Fund also argues that the Act adequately protects Dr. Long's due process rights. To determine the constitutional adequacy of the Act's procedures, identification of the specific dictates of due process generally requires consideration of three distinct factors: (1) the private interest that will be affected by the Act; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976).

The Act provides certain procedural protections to the provider. K.S.A. 40-3410 provides that once the claimant and the commissioner reach a settlement, a petition is filed by the claimant with the court for approval of the agreement. The court then conducts a hearing at which the

claimant, the health care provider and the Fund may appear. If the court finds the settlement valid, just and equitable, it will approve the settlement. If the settlement is not approved, the court orders the action to proceed. K.S.A. § 40-3411.

Under the procedural framework of the Act, a health care provider is given the opportunity to represent his interests to the court at the settlement hearing, thus maintaining his procedural due process rights under the Act.

St. Paul and the Fund settled the claim against the physician without any personal liability to Dr. Long. Dr. Long has no right to complain because the action was settled, if the State had a significant overriding countervailing interest.

There is no individual due process right where the State has a countervailing interest of overriding significance. See *State ex rel. Schneider v. Liggett*, 223 Kan. 610. In *Liggett*, this court found that mandatory malpractice insurance bears a rational relationship to the health and welfare of the citizens of this state by not only providing protection to patients who may be injured as a result of medical malpractice, but by assuring that there continues to exist in the state an adequate supply of health care providers. For the same reasons, the provisions of the Act now questioned by Dr. Long are upheld as they provide an overriding state interest in maintaining adequate health care providers in the state, as well as providing sufficient amounts to cover the economic costs of a claimant's injuries caused by medical malpractice.

The provisions of the Kansas Health Care Provider

Insurance Act (K.S.A. § 40-3401, *et seq.* [Ensley 1981]) do not deprive a health care provider of a property right, *i.e.*, the right to defend an action, or a due process right. The Act does not violate the Fourteenth Amendment to the United States Constitution or Section 18 of the Bill of Rights of the Kansas Constitution.

Affirmed.

———o———

2. SHERMAN COUNTY DISTRICT COURT

IN THE DISTRICT COURT OF SHERMAN COUNTY, KANSAS
FILED PURSUANT TO CHAPTER 60
OF THE KANSAS STATUTES ANNOTATED

BRADLEY M. HARRISON, a minor,
by and through his Next Friends and Natural Parents,
MICHAEL L. and MARLA K. HARRISON,

and

MICHAEL L. and MARLA K. HARRISON,
individually,

plaintiffs,

vs. Case No. 84 C 92

LLOYD O. LONG, MD,

defendant.

JOURNAL ENTRY

NOW, on this 12th day of May, 1986, comes on for hearing the Motion of the defendant for relief from Journal Entry. The plaintiffs appear by and through their counsel, Kyle L. Larson. The defendant appears personally and by and through his attorney, Jeffrey A. Mason of FOUST & VIGNERY, Goodland, Kansas, and Laurin D. Quiat of Cogswell and Wehrle, Denver, Colorado. The Health Care Stabilization Fund appears by and through its counsel, Thomas L. Theis and Derenda Mitchell. Also appearing is B.G. Larson. The Honorable Jack L. Burr is present and presides.

Thereupon, Mr. Mason moves for the admission of Mr. Quiat, pursuant to Supreme Court Rule No. 116 for the purposes of this hearing, and all further proceedings in this case. After hearing statements of counsel, and being well and truely (sic) advised in the premises, the Court finds that Laurin D. Quiat of Cogswell and Wehrle, Denver, Colorado, should be admitted, pursuant to Supreme Court Rule No. 116 for the purposes of this hearing, and all further proceedings.

After hearing statements of counsel, reviewing the briefs of the parties, and being well and truely (sic) advised in the premises, the Court finds that the Kansas Health Care Provider Insurance Act contained in K.S.A. § 40-3401, *et seq.* is constitutional and that by reason thereof, the defendant's Motion for Relief from Journal Entry is denied. The Court adopts and incorporates herein by reference it (sic) comments on the record in ruling on the Motion as its findings in fact and conclusions of law with respect to its ruling.

IT IS THEREFORE BY THE COURT, CONSIDERED, ORDERED, ADJUDGED AND DECREED, that the defendant's Motion for Relief from the Journal Entry is and the same is hereby denied.

DATED: *6/16/86* */s/*
Jack L. Burr
Associate District Judge

APPROVED:

SLOAN, LISTROM, EISENBARTH, SLOAN, AND GLASSMAN

BY: */s/*
Thomas L. Theis
714 Capitol Federal Building
Topeka, Kansas 66603
Telephone: 913-357-6311
Attorneys for Health Care Stabilization Fund

FOUST & VIGNERY

BY: */s/*
Jeffrey A. Mason
214 E. 10th Street
P.O. Box 767
Goodland, Kansas 67735

—o—

3. Section One of the Fourteenth Amendment to the United States Constitution reads as follows:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of rights, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

—o—

4. The Constitution of the State of Kansas, Bill of Rights, Section 18 reads as follows:

Justice without Delay. All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.

—o—

5. Kansas Statutes Annotated (K.S.A.) § 40-3401:

(e) "Fund" means the health care stabilization fund established pursuant to subsection (a) of K.S.A. 40-3403 and amendments thereto.

—o—

6. K.S.A. § 40-3403:

(a) For the purpose of paying damages for personal injury or death arising out of the rendering of or the failure to render professional services by a health care provider, self-insurer or inactive health care provider subsequent to the time that such health care provider or self-insurer has

qualified for coverage under the provisions of this act, there is hereby established the health care stabilization fund. The fund shall be held in trust in a segregated fund in the state treasury. The commissioner shall administer the fund or contract for the administration of the fund with an insurance company authorized to do business in this state.

———o———

7. K.S.A. § 40-3404a:

Surcharge amount; experience rating. The commissioner shall establish by rules and regulations an experience rating system to become effective on July 1, 1987, that requires a higher surcharge from health care providers based upon past claims paid from the fund on behalf of such providers. In establishing such rating system, the commissioner shall give consideration to the number, size and frequency of the claims paid, and the classification of the health care provider, from the date the fund was established. The commissioner shall provide, upon written request of any health care provider, a written statement showing the basis for the experience rating of such health care provider.

———o———

8. K.S.A. § 40-3410:

Negotiation of amount of claim to be paid from fund; settlement; procedure for court approval. When the insurer of a health care provider or inactive health care provider covered by the fund has agreed to settle its liability on a claim against its insured or when the self-insurer has agreed to settle liability on a claim and the claimant's demand is in an amount in excess of such settlement, or where a claim is against an inactive health care provider

covered by the fund who does not have liability insurance in effect which is applicable to the claim, or where it would otherwise be in the best interest of the fund, the claimant and the commissioner may negotiate on an amount to be paid from the fund. The commissioner may employ independent counsel to represent the interest of the fund in any such negotiations. In the event the claimant and the commissioner agree upon an amount the following procedure shall be followed:

(a) A petition shall be filed by the claimant with the Court in which the action is pending against the health care provider or the inactive health care provider, or if none is pending, in a court of appropriate jurisdiction, for approval of the agreement between the claimant and the commissioner.

(c) At such hearing the court shall approve the proposed settlement if the court finds it to be valid, just and equitable.

———o———

9. Notice of Appeal to the Supreme Court of the United States.

IN THE SUPREME COURT
STATE OF KANSAS

LLOYD O. LONG, M.D.
Appellant,

v.

BRADLEY M. HARRISON, a minor, by and through his next friends and natural parents, MICHAEL L. and MARLA K. HARRISON, and MICHAEL L. and MARLA K. HARRISON,
Appellees.

NO. 59,739

—o—

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Lloyd O. Long, M.D., the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Kansas, affirming the trial court, entered in this action on March 27, 1987.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2).

Respectfully submitted,

FOUST AND VIGNERY

Jeffrey A. Mason, Esq.
P.O. Box 767
Goodland, Kansas 67735
(913) 899-6588

Laurin D. Quiat, Esq.
Cogswell and Wehrle
1700 Lincoln, Suite 3500
Denver, Colorado 80203
Telephone: (303) 861-2150
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have this 24th day of June, 1987 placed a true and correct copy of the foregoing pleading in the U.S. Mail, postage prepaid, addressed as follows:

Thomas L. Theis
Jeffrey W. Jones
Sloan, Listrom, Eisenbarth,
Sloan & Glassman
714 Capitol Federal Building
Topeka, Kansas 66602

G.B. Larson
Williams, Larson, Voss, Strobel
and Estes
P.O. Box 39
Dodge City, Kansas 67801

Kyle L. Larson
Zuspann & Larson
1015 Center
Goodland, Kansas 68735

Thomas E. Sullivan
10955 South Lowell, Suite 510
Overland Park, Kansas 66210

No. 87-23

Supreme Court, U.S.
FILED
JUL 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1987

LLOYD O. LONG, M.D.,
Appellant,

v.

BRADLEY M. HARRISON, a Minor, by and through his Next Friends and Natural Parents, MICHAEL L. and MARCIA K. HARRISON, and MICHAEL L. and MARCIA K. HARRISON,
Appellees,

v.

FLETCHER BELL, Commissioner of Insurance, State of Kansas,
Intervenor/Appellee.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

INTERVENOR-APPELLEE FLETCHER BELL'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION TO AFFIRM

ERLE W. FRANCIS
Attorney of Record
THOMAS L. THEIS
JEFFREY W. JONES
SLOAN, LISTROM, EISENBARTH, SLOAN & GLASSMAN
714 Capitol Federal Building
Topeka, Kansas 66603
(913) 357-6311

DERENDA J. MITCHELL
HEALTH CARE STABILIZATION FUND
Kansas Insurance Department
420 S.W. 9th Street
Topeka, Kansas 66612

Attorneys for Intervenor-Appellee, Fletcher Bell, Commissioner of Insurance, State of Kansas

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS TO DISMISS THIS APPEAL	5
A. Appellant Lacks Standing to Challenge the Act	5
1. Standing in General	5
2. Appellant is Estopped From Challenging the Act	7
B. This Appeal Does Not Present a Substantial Federal Question	10
C. The Decision of the Kansas Supreme Court Rests on an Adequate Non-Federal Basis	10
REASONS TO AFFIRM THIS APPEAL	13
A. The Decision of the Kansas Supreme Court was Correct	13
1. The Presumption of Constitutionality Enjoyed by Legislative Enactments Holds Sway in This Case	14
2. Appellant's Claim of a Property Interest is so Unsubstantial as Not to Need Further Argument	15
3. The Act Contains Adequate Due Process Safeguards	18
CONCLUSION	21

TABLE OF AUTHORITIES

Page

CASES:

Adkins v. Children's Hospital, 261 U.S. 525, 544, 43 S.Ct. 394, 396, 67 L.Ed. 785, 24 A.L.R. 1238 (1922) 14

Agins v. City of Tiburon, 447 U.S. 255, 259, n.6, 100 S.Ct. 2138, 2141, n.6, 65 L.Ed.2d 106 (1980) 10

Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972) 11

Chandler v. Florida, 449 U.S. 560, 570, 101 S.Ct. 802, 807, 66 L.Ed.2d 740 (1981) 9

Cramp v. Board of Public Instruction of Orange County, Fla., 368 U.S. 278, 282, 82 S.Ct. 275, 278, 7 L.Ed.2d 285 (1961) 6

Duke Power Co. v. Carolina Environmental Study, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978) 6, 7

Fahey v. Mallonee, 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed. 2030 (1947) 7, 8

Fox Film Corp. v. Muller, 296 U.S. 207, 210, 56 S.Ct. 183, 184, 80 L.Ed. 158 (1935) 13

Harrison v. Long, 241 Kan. 174, 734 P.2d 1155 (1987) 2

In re Kemmler, 136 U.S. 436, 10 S.Ct. 930, 34 L.Ed. 519 (1890) 12

International Longshoremen's Ass'n, AFL-CIO v. Davis, — U.S. —, 106 S.Ct. 1904, 90 L.Ed2d 389 (1986) 21

Life and Casualty Co. of Tennessee v. McCray, 291 U.S. 566, 572, 54 S.Ct. 482, 485, 78 L.Ed. 987 (1934) 14

Logan v. Zimmerman Brush Co., 455 U.S. 422, 429-430, 102 S.Ct. 1148, 1154, 71 L.Ed.2d 265 (1982) 16

TABLE OF AUTHORITIES—Continued

Page

Los Angeles County v. Southern California Tel. Co., 196 P.2d 773, 32 Cal.2d 378 (1949) 14

Martin v. Walton, 368 U.S. 25, 26, 82 S.Ct. 1, 2, 7 L.Ed.2d 5 (1961), *reh. denied* 368 U.S. 945, 82 S.Ct. 376, 7 L.Ed.2d 341 10

Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) 18

Michigan v. Long, 463 U.S. 1032, 1038, n.4, 103 S.Ct. 3469, 3475, n.4, 77 L.Ed.2d 1201 (1983) 11

Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 544-545, 97 S.Ct. 1932, 1959, 52 L.Ed.2d 531 (1977) 11

NAACP v. State of Alabama ex rel. Patterson, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958) 13

Parham v. Hughes, 441 U.S. 347, 351, 99 S.Ct. 1742, 1745, 60 L.Ed.2d 269 (1979) 14

Payton v. New York, 445 U.S. 573, 600, n.52, 100 S.Ct. 1371, 1387, n.52, 63 L.Ed.2d 639 (1980) 10

Pinckney v. District of Columbia, 439 F.Supp. 519, 530 (D.C.C. 1977) 11

Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 41-42, 96 S.Ct. 1917, 1925-1926, 48 L.Ed.2d 450 (1976) 5

State ex rel. Schneider v. Liggett, 223 Kan. 610, 612-613, 616, 576 P.2d 221, 224, 227 (1978) 8, 12, 19

Toombs v. Citizens' Bank of Waynesboro, 281 U.S. 643, 647, 50 S.Ct. 434, 436, 74 L.Ed. 1088 (1930) 14

Tulsa v. Southwestern Bell Tel. Co., 75 F.2d 343 (10th Cir. 1935), cert. denied 295 U.S. 744, 55 S.Ct. 656, 79 L.Ed.2d 1690 (1935) 14

TABLE OF AUTHORITIES—Continued

Page

United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO, 413 U.S. 548, 571, 93 S.Ct. 2880, 2893, 37 L.Ed.2d 796 (1973) 14

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 261, 97 S.Ct. 555, 561, 50 L.Ed.2d 450 (1977) 5

STATUTES:

Fed. R. Civ. P. 41, 28 U.S.C.A. 16

K.S.A. 40-3401, et seq. 1, 2

K.S.A. 40-3402(a) 3, 9

K.S.A. 40-3401(f) 3, 9

K.S.A. 40-3403(a) 3

K.S.A. 40-3403(c)(1) 3

K.S.A. 40-3404(a) 3

K.S.A. 40-3410 ..... 4, 20

K.S.A. 60-241(a) 16

U.S. Sup. Ct. Rule 16.1(b), 28 U.S.C.A. 1, 5, 10

U.S. Sup. Ct. Rule 16.1(d), 28 U.S.C.A. 2, 13

CONSTITUTIONAL PROVISIONS:

United States Constitution, Amendment XIV Section 1 ..... 2, 10, 11, 18, 21, 22

Kansas Constitution, Bill of Rights, Section 18 ..... 2, 12, 13, 17

No. 87-23

In The

Supreme Court of the United States

October Term, 1987

LLOYD O. LONG, M.D.,

Appellant,

v.

BRADLEY M. HARRISON, a Minor, by and through his Next Friends and Natural Parents, MICHAEL L. and MARCIA K. HARRISON, and MICHAEL L. and MARCIA K. HARRISON,

Appellees,

v.

FLETCHER BELL, Commissioner of Insurance, State of Kansas,

Intervenor/Appellee.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

INTERVENOR-APPELLEE FLETCHER BELL'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION TO AFFIRM

Lloyd O. Long, M.D. ("Appellant") appeals from the final decision of the Kansas Supreme Court, dated March 27, 1987. That decision upheld the constitutionality of the Kansas Health Care Provider Insurance Act, K.S.A. 40-3401, et seq., ("the Act"). Fletcher Bell, as Commissioner of Insurance of the State of Kansas, was an intervenor/appellee in the courts below. For the reasons stated herein, Intervenor/Appellee Fletcher Bell, ("Intervenor"), respectfully urges that appellant's appeal be dismissed pursuant to U.S. Sup. Ct. Rule 16.1(b), 28 U.S.C.A., or,

in the alternative, that appellant's appeal be affirmed in accordance with U.S. Sup. Ct. Rule 16.1(d), 28 U.S.C.A.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Kansas is reported as *Harrison v. Long*, 241 Kan. 174, 734 P.2d 1155 (1987). The Journal Entry of the District Court of Sherman County, Kansas, dated June 16, 1986, from which the appeal to the Kansas Supreme Court was taken, is not reported. Both of these decisions are reproduced in the Appendix to Appellant's Jurisdictional Statement, and thus, Intervenor will not include them in the Appendix to these instant motions.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourteenth Amendment, Section 1, United States Constitution; Section 18, Bill of Rights, Kansas Constitution; Kansas Statutes Annotated, § 40-3401, et seq. (1981).

The above-mentioned constitutional provisions, and pertinent portions of the statutes, are set forth in the Appendix to these instant motions.

STATEMENT OF THE CASE

Appellant Lloyd O. Long, M.D. is a physician licensed to practice medicine in the State of Kansas. On June 28, 1984, an action for medical malpractice was instituted against appellant by appellees Bradley M., Michael L. and Marla K. Harrison, in the District Court of Sherman County, Kansas. That action arose out of appellant's rendition of medical treatments to appellee Bradley M. Harrison in approximately January, 1983.

At the time of the acts giving rise to this action, the Act required all "resident health care providers," (which includes physicians) practicing in Kansas to acquire and maintain a policy of professional liability insurance which provided basic coverage in an amount equal to or in excess of $100,000.00 per occurrence and $300,000.00 annual aggregate; (those amounts have subsequently been raised). K.S.A. 40-3402(a) and 40-3401(f). Appellant had in force and effect at that time a policy of professional liability insurance conforming to these minimum requirements.

The Act also created and defined the Health Care Stabilization Fund ("the Fund"), which is administered by Intervenor. K.S.A. 40-3403(a). The Fund is responsible (with certain limitations) for the payment of that amount of any judgment or settlement in a medical malpractice case which exceeds the basic coverage afforded the defendant-physician under his mandatory policy of professional liability insurance. K.S.A. 40-3403(c)(1). Health care providers must pay an annual surcharge to the fund in order to qualify for this excess coverage. K.S.A. 40-3404(a).

Under K.S.A. 40-3410, whenever the basic insurer of a health care provider agrees to tender the limits of its coverage in order to settle a claim, but that claim exceeds the amount of such coverage, the commissioner is authorized to negotiate with the claimant on an amount to be paid out of the Fund. When such an amount is agreed upon, the claimant must then file a petition in the court where the underlying action is pending, for the approval of the agreement. A hearing is promptly called, with notice to the claimant, the health care provider, and the commissioner. The court will approve the settlement between the claimant and the Fund if it is found to be valid, just and equitable.

Appellant's insurance carrier, St. Paul Fire and Marine Insurance Company (St. Paul) and the Fund entered into negotiations with the appellees, and eventually effected a settlement of the lawsuit against appellant. That settlement was approved by the District Court of Sherman County, Kansas by Journal Entry dated June 19, 1985. That settlement was reached over appellant's objections.

On June 28, 1985, appellant sought relief in the District Court from the Journal Entry approving the settlement. Appellant's motion for relief was denied on June 16, 1986. Appellant then brought and perfected an appeal to the Kansas Supreme Court, challenging the constitutionality of that part of the Act which allows the Fund to settle actions over the objections of the defendant-physician.

On November 7, 1986, the Fund moved for leave to intervene in that appeal, and on November 17, 1986, that motion was granted by the Kansas Supreme Court. By decision dated March 27, 1987, the Kansas Supreme Court

affirmed the decision of the District Court of Sherman County, Kansas. Appellant subsequently caused the instant appeal to be docketed with this court.

REASONS WHY THIS APPEAL SHOULD BE DISMISSED

This appeal should be dismissed pursuant to U.S. Sup. Ct. Rule 16.1(b), 28 U.S.C.A., as Intervenor will demonstrate below.

A. Appellant Lacks Standing To Challenge The Act

This appeal should be dismissed because appellant lacks standing to challenge the Act.

1. Standing In General

In order to raise a constitutional challenge, a person must first demonstrate that he has "standing." It has been stated that standing requires the person have "a personal stake in the outcome of the controversy." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 261, 97 S.Ct. 555, 561, 50 L.Ed.2d 450 (1977). In other words, the challenged conduct must cause the person injury. That injury need not be economic, and it may be indirectly inflicted; but it must be sustained by the person himself and it must be fairly traceable to the challenged conduct. *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42, 96 S.Ct. 1917, 1925-1926, 48 L.Ed.2d 450 (1976).

The Kansas Supreme Court determined that appellant had standing to challenge the Act. That conclusion is not

binding on this Court, though. Rather, this Court will undertake an independent assessment of the appellant's standing (or lack thereof). *Cramp v. Board of Public Instruction of Orange County, Fla.*, 368 U.S. 278, 282, 82 S.Ct. 275, 278, 7 L.Ed.2d 285 (1961).

In the case of *Duke Power Co. v. Carolina Environmental Study,* 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978), this Court held that standing requires the coexistence of three factors: injury in fact to the plaintiff; "individuated injury"; and causation in fact. Appellant's situation fails to satisfy these requirements.

Turning to the first two of these three factors, there is no evidence in the record in this case to support appellant's assertion that he has in fact suffered a distinct and palpable injury. Appellant alleges that he has suffered a loss of reputation, an increase in his malpractice insurance premiums, and an increase in the surcharge which is collected by the Fund pursuant to the Act. However, there is no evidence in the record to support any of these claims. All appellant has offered in support of these allegations are bald assertions by his counsel at oral argument before the Kansas Supreme Court. Appellant has therefore failed to document adequately his asserted injury in fact, or his assertion of "individuated injury." That failure is fatal to his claim of standing.

Even assuming that appellant's naked assertions of injury are sufficient to satisfy the first two requirements for standing, he must still demonstrate the third requirement—causation. Intervenor submits that appellant's bare assertions of causation are not sufficient to satisfy that requirement. Appellant maintains that it is the *settling*

of the claim against him that has caused his asserted injuries. Because of the lack of any evidentiary record on this subject, it is impossible to determine whether the *settling* of the claim had these effects, or whether appellant's asserted injuries occurred simply as the result of the *making* of a claim against him. In fact, because of the total lack of any evidence on this subject, it is even possible to surmise that appellant's asserted injuries resulted from circumstances wholly unrelated to the instant case. To employ the words this Court used in *Duke Power Co.*, supra, there is not a "fairly traceable causal connection between the claimed injury and the challenged conduct." 438 U.S. at 72, 98 S.Ct. at 2630. As such, appellant has failed to meet the basic requirements for standing, and this appeal should be dismissed.

2. Appellant Is Estopped From Challenging The Act

Even though a party has standing to sue, he may still be estopped from challenging a statute's constitutionality if he has voluntarily claimed or accepted the benefits bestowed by that statute. As this Court stated in *Fahey v. Mallonee*, 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed. 2030 (1947):

> In the name and right of the Association it is now being asked that the Act under which it has its existence be struck down in important particulars, hardly severable from those provisions which grant its right to exist. Plaintiffs challenge the constitutional validity of the only provision under which proceedings may be taken to liquidate or conserve the Association for the protection of its members and the public. If it can hold the charter that it obtained under this Act and strike down the provision for terminating its powers or conserving its assets, it may perpetually go on, notwithstanding any abuses which its management may perpetrate. It would be intolerable that the Congress

> should endow an Association with the right to conduct a public banking business on certain limitations and that the Court at the behest of those who took advantage from the privilege should remove the limitations intended for public protection. It would be difficult to imagine a more appropriate situation in which to apply the doctrine that one who utilizes an Act to gain advantages of corporate existence is estopped from questioning the validity of its vital conditions. We hold that plaintiffs are estopped, as the Association would be, from challenging the provisions of the Act which authorize the Board to prescribe the terms and conditions upon which a conservator may be named.

332 U.S. at 255-256, 67 S.Ct. at 1557.

Like the Congressional enactments under attack in *Fahey v. Mallonee,* supra., the provisions of the Act which appellant assails were designed to protect the public. The provisions appellant assails are also inseparable from the rest of the Act. The Fund could not long exist if it did not have some measure of control over its potential liability, and thus, its economic vitality. As the Kansas Supreme Court has held, the mandatory malpractice insurance required by the Act bears a rational relationship to the health and welfare of the citizens of Kansas, not only by providing protection to patients who are injured as a result of medical malpractice, but also by assuring that there is an adequate supply of health care providers in Kansas. *State ex rel. Schneider v. Liggett,* 223 Kan. 610, 616, 576 P.2d 221, 227 (1978). Similarly, as the Kansas Supreme Court held in its opinion in this case:

> For the same reasons, the provisions of the Act now questioned by Dr. Long are upheld as they provide an overriding state interest in maintaining adequate health care providers in the state, as well as providing sufficient amounts to cover the economic costs of a claimant's injuries caused by medical malpractice.

241 Kan. at 182, 734 P.2d at 1161. Being the final pronouncements of the highest court in Kansas on a question of the interpretation of a state statute, these interpretations of the Act are binding on this Court. *Chandler v. Florida*, 449 U.S. 560, 570, 101 S.Ct. 802, 807, 66 L.Ed.2d 740 (1981).

Appellant has clearly availed himself of the Acts' benefits and protections for many years. The Act came into existence in 1976. Since that time, physicians such as appellant have needed only the basic, minimum professional malpractice insurance coverage. For potential liability over and above that amount, resort could be had to the Fund. Thus, for as long as appellant has been a "resident health care provider" (as defined by K.S.A. 40-3401 [f] and 40-3402[a]), appellant has enjoyed a real and substantial benefit—a measure of protection from potential liability that might only be available to him at a greater price on the open market, if it was available at all in the absence of the Act. Appellant has apparently always paid his surcharge without protest; thus, his acceptance of the Act's benefits was voluntary. And finally, in this very case, the appellees' claims against appellant were dismissed with prejudice after the Fund paid appellees out of its own resources. Appellant himself has had to assume no personal liability in this case.

Despite his acquiescence in the validity of the Act, and his enjoyment of its protections, appellant now challenges a portion of the Act designed to protect the public. Justice and equity are not served by this action on appellant's part. For all these reasons, appellant should be estopped from challenging the very same provisions of the Act which he has voluntarily and knowingly accepted the benefits of in the past.

B. This Appeal Does Not Present A Substantial Federal Question

This appeal should be dismissed because its does not present a substantial federal question.

As this Court held in *Martin v. Walton,* 368 U.S. 25, 26, 82 S.Ct. 1, 2, 7 L.Ed.2d 5 (1961), *reh. denied* 368 U.S. 945, 82 S.Ct. 376, 7 L.Ed.2d 341, where it appears that state laws are not beyond the allowable range of state action under the Fourteenth Amendment, then no substantial federal question is presented, and the appeal should be dismissed. Likewise, an objection to a state court's application of state law does not raise a substantial federal question. *Agins v. City of Tiburon,* 447 U.S. 255, 259, n.6, 100 S.Ct. 2138, 2141, n.6, 65 L.Ed.2d 106 (1980).

As intervenor will show in the following sections of this brief, the state-law questions in this appeal outweigh and overshadow any federal questions here presented and the decision in this case rests on an adequate non-federal ground. By deciding this case on state law grounds, the Kansas Supreme Court has insulated itself from review by this Court. *Payton v. New York,* 445 U.S. 573, 600, n.52, 100 S.Ct. 1371, 1387, n.52, 63 L.Ed.2d 639 (1980). For these reasons, this Court should dismiss this appeal pursuant to U.S. Sup. Ct. Rule 16.1(b), because it does not present a substantial federal question.

C. The Decision Of The Kansas Supreme Court Rests On An Adequate Non-Federal Basis

This appeal should be dismissed because the decision of the Kansas Supreme Court rests on an adequate non-federal basis, and thus, this Court lacks jurisdiction over

this appeal. *Michigan v. Long,* 463 U.S. 1032, 1038, n.4, 103 S.Ct. 3469, 3475, n.4, 77 L.Ed.2d 1201 (1983).

Appellant claims to possess a federally-protected property interest in the status of being a defendant. That is to say, appellant claims that those protions of the Act which permit the Fund to settle cases over the physician's objections deprived him of his right to vindicate his name in court and to avoid all the injuries appellant claims he suffered as a result of the settlement of appellees' case against him. This, claims appellant, was a deprivation of property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the United States Constitution.

The cornerstone of any due process claim is the existence of a protected interest in either liberty or property. If there is no such protected interest, then due process considerations never come into play. *Moore v. City of East Cleveland, Ohio,* 431 U.S. 494, 544-545, 97 S.Ct. 1932, 1959, 52 L.Ed.2d 531 (1977). The issue of whether there is a valid interest to protect is one which should be decided at the outset, because resolution of that threshold issue can avoid many needless due process adjudications. *Pinckney v. District of Columbia,* 439 F.Supp. 519, 530 (D.C.C. 1977).

Property interests are protected by the Constitution, but they are not created by it. They owe their existence to state law. *Board of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). The typical bases for such interests are contracts and state laws—"rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth,* 408 U.S. at 577, 92 S.Ct. at 2709.

Appellant asserts that Section 18 of the Bill of Rights of the Kansas Constitution creates the protected property right to defend oneself in court against a civil claim for damages which he claims. Section 18 states:

> All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.

Intervenor has consistently argued that Section 18 only protects plaintiffs from a system of discriminatory access to the state courts. According to previous holdings by the Kansas Supreme Court, Section 18 is not an absolute bar to a change in the common law of the state. See, e.g., *State ex rel. Schneider v. Liggett,* 223 Kan. at 612-613, 576 P.2d at 224 (1978).

The Kansas Supreme Court obviously agreed with Intervenor's arguments, for that court rejected appellant's contention that Section 18 created a property interest which the Act then deprived appellant of, and held that Section 18 creates no protected property right to defend oneself in court. See 241 Kan. at 179, 734 P.2d at 1160. That court also held that the Act does not violate Section 18 of the Kansas Constitution directly. See 241 Kan. at 182, 734 P.2d at 1161. The correctness of these decisions will be discussed, infra. It seems sufficient to say at this point that the Kansas Supreme Court, having spoken on a subject of state law, (i.e., the constitutionality of a state statute under the state constitution, as well as the effect of a state constitutional provision), is the final authority on that subject, and this Court has no jurisdiction to review those determinations of state law. See *In re Kemmler,* 136 U.S. 436, 10 S.Ct. 930, 34 L.Ed. 519 (1890).

Appellant's claim that the Act violates Section 18 of the Bill of Rights of the Kansas Constitution has been rejected by the highest court of that state. Likewise, appellant's claim that Section 18 creates a property interest, or right to insist that an action not be settled over one's objections, has also been rejected by the Kansas Supreme Court. Because these purely state-law determinations adequately and completely dispose of this case, and because these determinations do not unreasonably infringe on a federal right, there is no reason, and indeed, no right, for this Court to address appellant's federal due process claim. See *Fox Film Corp. v. Muller,* 296 U.S. 207, 210, 56 S.Ct. 183, 184, 80 L.Ed. 158 (1935); *NAACP v. State of Alabama ex rel. Patterson,* 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). Accordingly, this Appeal should be dismissed for lack of jurisdiction.

———o———

REASONS TO AFFIRM THIS APPEAL

In the alternative to his Motion to Dismiss, Intervenor submits that this case should be affirmed pursuant to U.S. Sup. Ct. Rule 16.1(d), 28 U.S.C.A., as shown below.

A. The Decision Of The Kansas Supreme Court Was Correct

The decision of the Kansas Supreme Court should be affirmed by summary disposition because that decision is correct in all respects. Three independent grounds support this conclusion.

1. The Presumption of Constitutionality Enjoyed by Legislative Enactments Holds Sway in This Case.

When assessing the constitutionality of a statute, there is a strong presumption in favor of constitutionality. *Parham v. Hughes,* 441 U.S. 347, 351, 99 S.Ct. 1742, 1745, 60 L.Ed.2d 269 (1979). The basic purpose of the courts is to save, not to destroy, the Acts of the legislature when this can reasonably be done. *United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO,* 413 U.S. 548, 571, 93 S.Ct. 2880, 2893, 37 L.Ed.2d 796 (1973). All insignificant doubts should be resolved in favor of the constitutionality of the enactment, e.g., *Toombs v. Citizens' Bank of Waynesboro,* 281 U.S. 643, 647, 50 S.Ct. 434, 436, 74 L.Ed. 1088 (1930), and a statute should be declared unconstitutional only when it appears so beyond any reasonable doubt, e.g., *Adkins v. Children's Hospital,* 261 U.S. 525, 544, 43 S.Ct. 394, 396, 67 L.Ed. 785, 24 A.L.R. 1238 (1922).

As noted above, the presumption in favor of constitutionality is a strong one. It becomes even stronger when the Act in question has a history of acquiescence in its propriety. *Life and Casualty Co. of Tennessee v. McCray,* 291 U.S. 566, 572, 54 S.Ct. 482, 485, 78 L.Ed. 987 (1934). Thus, it is important that the Act here involved has been treated as valid by the governmental officials empowered with its administration. See, e.g., *Tulsa v. Southwestern Bell Tel. Co.,* 75 F.2d 343 (10th Cir. 1935), cert. denied 295 U.S. 744, 55 S.Ct. 656, 79 L.Ed. 1690 (1935). Of equal, if not more importance, is the fact that vast sums of money have been invested for many years in reliance on the rights and interests granted by the Act. See, e.g., *Los Angeles*

County v. Southern California Tel. Co., 196 P.2d 773, 32 Cal.2d 378 (1949), *appeal dismissed* 336 U.S. 929, 69 S.Ct. 737, 93 L.Ed. 1090 (1949).

The Fund has accumulated a truly vast sum of money for use as prescribed in the Act. Over the years, the Fund has also paid out large sums in the performance of its function. In addition, numerous resident health care providers have relied on the Act, by paying their surcharges and counting on the Fund's excess coverage. The innumerable class of successful plaintiffs (past, present and future) has also relied on the Fund, even if unknowingly. Based upon this long history of justified reliance on the statutory scheme, including large investments of capital, and the wide-reaching, adverse consequences of a sudden disruption in this system, the presumption of constitutionality should prevail in this case. The conclusion of the Kansas Supreme Court to this same effect, being correct, should be affirmed by summary disposition.

2. Appellant's Claim Of A Property Interest Is So Unsubtantial As Not to Need Further Argument.

Appellant's claim to a property interest in being (and remaining) a defendant in a civil action, for the purpose of vindicating himself of the tort claims being asserted against him in that action, is a paltry one at best. That claim is so unsubstantial that it should be rejected summarily, and this case should be affirmed without further argument.

To the best of Intervenor's information and belief, no court in the history of American jurisprudence has held as appellant would have this Court hold. It is assumed

by Intervenor that appellant has researched long and hard for a case directly in point and supporting his position. And yet, appellant has never been able to cite even one such case to any court before which this case has appeared. From this total lack of results, despite diligent research by both parties, the logical conclusion is that no such case exists.

To be sure, the cases are legion which hold that a plaintiff's cause of action is a protected property interest. See, e.g., *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-430, 102 S.Ct. 1148, 1154, 71 L.Ed.2d 265 (1982). However, there is a vast difference between holding that a plaintiff may not be denied his day in court on his claim, and holding that a defendant may insist that an action against him not be settled, just so he can vindicate himself by prevailing in that action.

Unlike the plaintiff, then, whose cause of action is protected by the Constitution from dilution or extinction, the defendant in a civil action has no right to insist that the plaintiff prosecute the action to fruition. This legal premise is demonstrably proven by the fact that under the Kansas Code of Civil Procedure, an action can be voluntarily dismissed at the behest of the plaintiff. While court approval of a voluntary dismissal is required at some stages in the proceedings, and the court also has the power to condition the dismissal for the defendant's protection, the defendant has no absolute right to prevent a voluntary dismissal of the plaintiff's case unless he has asserted a counterclaim (which in essence makes him a plaintiff as well as a defendant). See K.S.A. 60-241(a). This Kansas rule mirrors Rule 41 of the Federal Rules of Civil Pro-

cedure, 28 U.S.C.A. Both these rules are derived from the common law of civil procedure, and so come down to us with long histories.

Likewise, a defendant who is not a counterclaimant has no right to prevent the final settlement of the action, so long as that settlement imposes no personal liability upon that defendant. Of course, the Constitution requires that before a defendant may be held *personally* liable to the plaintiff, either a judgment must be rendered against that defendant after proceedings which comply with the requirements of due process of law, or the defendant must consent to a settlement which personally obligates him to the plaintiff. But where (as here) an insurer and the Fund have settled the action without any personal liability attaching to the appellant, appellant may not complain that the action was settled before he had an opportunity to vindicate himself of the charges made against him.

From the established proposition that Section 18 of the Kansas Constitution does not grant civil defendants the right to prevent the settlement of an action by an insurer, so long as the defendant incurs no personal liability as a result of the settlement, it follows that appellant did not have a protected property right to prevent the settlement of this action by the Fund. Because appellant had no such interest, no due process violation occurred when the Fund settled plaintiffs' claims against appellant, for no process is due if there is no interest to protect. Accordingly, the decision of the Kansas Supreme Court is correct and in conformity with the general rule in every particular. That decision should be affirmed by summary disposition because the questions raised by appellant are so unsubstantial as not to need further argument.

3. The Act Contains Adequate Due Process Safeguards.

And finally, this appeal should be affirmed because whatever rights or interests appellant is deemed to possess, the Act contains adequate due process safeguards to protect those rights and interests.

The following discussion assumes, *arguendo,* that appellant is deemed to have standing, that he has not waived that standing, and that under Kansas law he has a property interest worthy of due process protection. Nevertheless, and in spite of all these indulgences in his favor, appellant still has no valid due process claim under the Fourteenth Amendment, because the Act prescribes a system of judicial oversight sufficient to satisfy the requirement of Section 1 of that Amendment.

The term "due process" is not susceptible to a fixed and rigid definition. Due process is not a static concept, but is one which varies with the circumstances of each individual case. The cornerstones of due process are notice of the charges against one and an opportunity to be heard at a meaningful time and in a meaningful manner. The precise process which is required is based on the balancing of a number of factors: the nature of the individual interest which is affected, the nature of the government interest involved and the likelihood that procedural protections will be effective in avoiding erroneous deprivations of the private interest. See, e.g., *Mathews v. Eldridge,* 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976).

The private interest involved in this case is identified by appellant as his interest in preserving his professional reputation. Intervenor submits that there are also com-

peting governmental interests involved in this case, and that the requirements of due process must strike a fair balance between these various competing interests.

The primary governmental interest advanced by the Act is the assurance that an adequate supply of quality health care is available in Kansas. The legislature has determined that one way to promote this interest is to assure that malpractice insurance is readily available to physicians practicing in Kansas. The Fund, created by the Act, provides substantial excess coverage over the basic coverage all physicians must maintain. The Fund thus serves the important interest of assuring that successful plaintiffs will have a viable economic source for satisfaction of judgments in excess of the amount of the physician's basic insurance coverage.

If, as appellant suggests, health care providers are to be allowed to "opt-out" of Fund coverage, and become self-insurers in malpractice action *after* the action is filed, then the injured plaintiff may eventually obtain a substantial judgment against a provider who is unable to satisfy such a large judgment. The statutory scheme must of course accomodate all of the competing interests mentioned above, and it does so admirably. Any other conclusion would completely emasculate the mandatory coverage provisions of the Act, which were upheld from an attack not unlike appellant's in *State ex rel. Schneider v. Liggett, supra,* 223 Kan. at 616, 576 P.2d at 226-227.

In order to serve the variety of interests it does, the Fund must obviously maintain its own solvency. To this end, a centralized mechanism was established by the legislature, so that one entity (ie, the Fund) could oversee

virtually all medical malpractice cases in Kansas. The Fund has the obvious benefit of being able to compare and contrast past and present cases, and to share its expertise with private defense attorneys. The decision to settle a claim which exceeds the defendant's basic coverage is often guided by economic considerations: The Fund chooses to accept a certain amount of liability rather than risk the potentially greater liability that might result from a jury verdict against the provider. If providers could force the Fund to go to trial, rather than being allowed to settle large adverse jury verdicts could threaten the fiscal integrity of the Fund. The personal ego of the provider must not be elevated above the financial well-being of the Fund.

As Intervenor has shown, there are a number of competing interests involved in this case. None of these competing interests are trivial, and all are well served by the Act's regulatory scheme. As the Kansas Supreme Court held below, the Act bears a rational relationship to the furtherance of these legitimate governmental interests, and is thus constitutional.

Against the backdrop of these competing interests, one must now evaluate the procedural protections which are in place to monitor the operation of the Fund. K.S.A. 40-3410 establishes the procedural framework for judicial overview of the Fund's operations. Any proposed settlement between a claimant and the Fund must be given court approval, after a hearing, upon a finding that the settlement is valid, just, and equitable. The provider is given notice of the hearing and is permitted to appear and be heard. Appellant took advantage of these procedures in this case, but the settlement was approved over his objec-

tions. Nevertheless, this procedural framework is adequate to satisfy the requirements of due process, both in theory and in actual practice under the facts of this case.

Weighing and balancing the competing interests in this case, as must be done in every case involving due process analysis, it is indisputable that the statutory scheme created by the Act does not violate the Due Process Clause of the Fourteenth Amendment. This is true whatever quality this Court may ascribe to the interest claimed by appellant, even if his right to vindicate himself as the defendant in a civil suit is accorded the full status of a federally-protected property interest. And last, even if this Court entertains some doubts as to the adequacy of the Act's procedures, the adequacy of the state-law grounds for the state supreme court's decision, independent of appellants' federal due process claim, obviate the need for this Court to decide the claim. *International Longshoremen's Ass'n, AFL-CIO v. Davis*, — U.S. —, 106 S.Ct. 1904, 90 L.Ed.2d 389 (1986).

CONCLUSION

In summation, this appeal should be dismissed because appellant lacks standing to challenge the Act; appellant is estopped from challenging the Act; this appeal does not present a substantial federal question; and the decision of the Kansas Supreme Court rests on an adequate, non-federal basis.

In the alternative, this appeal should be summarily affirmed because the decision of the Kansas Supreme

Court upholding the constitutionality of the Act was correct; the questions raised by appellant are so unsubstantial as not to need further argument; and the Act contains procedural safeguards sufficient to satisfy the Due Process Clause of the Fourteenth Amndment.

For all of the above and foregoing reasons, this appeal should be dismissed, or, in the alternative, the decision of the Kansas Supreme Court from which appellant appeals should be affirmed by summary disposition.

Respectfully submitted,

ERLE W. FRANCIS
Attorney of Record
THOMAS L. THEIS
JEFFREY W. JONES
SLOAN, LISTROM, EISENBARTH,
SLOAN & GLASSMAN
714 Capitol Federal Building
Topeka, Kansas 66603
(913) 357-6311

and

DERENDA J. MITCHELL
HEALTH CARE STABILIZATION FUND
Kansas Insurance Department
420 S.W. 9th Street
Topeka, Kansas 66612

Attorneys for Intervenor-Appellee, Fletcher Bell, Commissioner of Insurance, State of Kansas

APPENDIX

U.S. Const., Amendment XIV, Section 1, states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Kansas Const., B. of R., Section 18, states:

> All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.

Pertinent portions of the Kansas Health Care Provider Insurance Act, K.S.A. 40-3401, *et seq.*, provide:

> A policy of professional liability insurance approved by the commissioner and issued by an insurer duly authorized to transact business in this state in which the limit of the insurer's liability is not less than one hundred thousand dollars ($100,000) per occurrence, subject to not less than a three hundred thousand dollar ($300,000) annual aggregate for all claims made during the policy period, shall be maintained in effect by each resident health care provider as a condition to rendering professional service as a health care provider in this state . . .

K.S.A. 40-3402(a), (since amended)

> 'Health care provider' means a person licensed to practice any branch of the healing arts by the state board of healing arts . . .

K.S.A. 40-3401(f)

> For the purpose of paying damages for personal injury or death arising out of the rendering of or the

failure to render professional services by a health care provider, self-insurer or inactive health care provider subsequent to the time that such health care provider or self-insurer has qualified for coverage under the provisions of this act, there is hereby established the health care stabilization fund. The fund shall be held in trust in a segregated fund in the state treasury. The commissioner shall administer the fund . . .

K.S.A. 40-3403(a).

Subject to subsections (d), (e), (f) and (i), the fund shall be liable to pay: (1) Any amount due from a judgment or settlement which is in excess of the basic coverage liability of all liable resident health care providers or resident self-insurers for any personal injury or death arising out of the rendering of or the failure to render professional services within or without this state . . .

K.S.A. 40-3403(c)(1).

[T]he commissioner shall levy an annual premium surcharge on each health care provider who has obtained basic coverage and upon each self-insurer for each fiscal year. Such premium surcharge shall be an amount equal to a percentage of the annual premium paid by the health care provider for the basic coverage required to be maintained as a condition to coverage by the fund by subsection (a) of K.S.A. 40-3402 and amendments thereto . . .

K.S.A. 60-3404(a).

When the insurer of a health care provider or inactive health care provider covered by the fund has agreed to settle its liability on a claim against its insured or when the self-insurer has agreed to settle liability on a claim and the claimant's demand is in an amount in excess of such settlement, or where a claim is against an inactive health care provider covered by the fund who does not have liability insurance in effect which is applicable to the claim, or where it would otherwise

be in the best interest of the fund, the claimant and the commissioner may negotiate on an amount to be paid from the fund. The commissioner may employ independent counsel to represent the interest of the fund in any such negotiations. In the event the claimant and the commissioner agree upon an amount the following procedure shall be followed:

(a) A petition shall be filed by the claimant with the court in which the action is pending against the health care provider or the inactive health care provider, or if none is pending, in a court of appropriate jurisdiction, for approval of the agreement between the claimant and the commissioner.

(b) The court shall set such petition for hearing as soon as the court's calendar permits, and notice of the time, date and place of hearing shall be given to the claimant, the health care provider or inactive health care provider, and to the commissioner.

(c) At such hearing the court shall approve the proposed settlement, if the court finds it to be valid, just and equitable . . .

K.S.A. 40-3410,(a)-(c).

Supreme Court, U.S.
FILED
AUG 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-23

In The
Supreme Court of the United States
October Term, 1987

LLOYD O. LONG, M.D.,

Appellant,

v.

BRADLEY M. HARRISON, a Minor, by and through his Next Friends and Natural Parents, MICHAEL L. and MARLA K. HARRISON, and MICHAEL L. and MARLA K. HARRISON,

Appellees,

v.

FLETCHER BELL, Commissioner of Insurance, State of Kansas,

Intervenor/Appellee.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

APPELLANT'S BRIEF IN OPPOSITION TO INTERVENOR-APPELLEE'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION TO AFFIRM

JEFFERY A. MASON
Counsel of Record
VIGNERY AND MASON
214 E. 10th Street
P.O. Box 767
Goodland, Kansas 67735
(913) 899-6588

LAURIN D. QUIAT
COGSWELL AND WEHRLE
Stanford Place 3, Suite 900
4582 South Ulster Street
Denver, Colorado 80237
(303) 773-8899

Attorneys for Appellant, Lloyd O. Long, M.D.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
ARGUMENT OPPOSING MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION TO AFFIRM	2
A. Appellant Has Standing to Challenge the Act	2
B. This Appeal Presents a Substantial Federal Question	4
C. The Act Does Not Contain Adequate Due Process Safeguards	6
CONCLUSION	8

TABLE OF AUTHORITIES

Page

CASES

Warth v. Seldin, 422 U.S. 490, 45 L.Ed. 2d 343, 95 S. Ct. 2197 (1975) 3

Duke Power Co. v. Carolina Env. Study Group, 438 U.S. 59, 57 L.Ed. 2d 595, 98 S. Ct. 2620 (1978) ... 3, 4

Dutoit v. Board of Johnson County Comm'rs, 233 Kan. 995, 667 P.2d 879 (1983) 3

Logan v. Zimmerman Brush Co., 455 U.S. 422, 1 L.Ed. 2d 265, 102 S. Ct. 1148 (1982) 5

Mathews v. Eldridge, 424 U.S. 319, 47 L.Ed. 2d 18, 96 S. Ct. 893 (1976) 6, 7

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 53 L.Ed. 2d 965, 97 S. Ct. 2849 (1977) 5

STATUTES

K.S.A. § 40-3401, *et seq.* (1981) 1, 2, 7

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. XIV, § 1 ..... 2, 5, 7, 8

Kan. Const. Bill of Rights, § 18 ..... 2, 5

No. 87-23

In The

Supreme Court of the United States

October Term, 1987

LLOYD O. LONG, M.D.,

Appellant,

v.

BRADLEY M. HARRISON, a Minor, by and through his Next Friends and Natural Parents, MICHAEL L. and MARLA K. HARRISON, and MICHAEL L. and MARLA K. HARRISON,

Appellees,

v.

FLETCHER BELL, Commissioner of Insurance, State of Kansas,

Intervenor/Appellee.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

APPELLANT'S BRIEF IN OPPOSITION TO INTERVENOR-APPELLEE'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION TO AFFIRM

Lloyd O. Long, M.D. ("Appellant") appeals from the final decision of the Kansas Supreme Court, dated March 27, 1987. That decision upheld the constitutionality of the Kansas Health Care Provider Insurance Act, K.S.A. 40-3401, et seq., ("the Act"). Fletcher Bell, Commissioner of Insurance for the State of Kansas, ("Intervenor") has filed a motion to dismiss the appeal, or in the alternative, to affirm the decision of the Kansas Supreme Court, pursuant to U.S. Sup. Ct. Rule 16.1(b), 28 U.S.C.A., and U.S.

Sup. Ct. Rule 16.1(d), 28 U.S.C.A. Pursuant to U.S. Sup. Ct. Rule 16.5, 28 U.S.C.A., Appellant files his Brief In Opposition To Intervenor-Appellee's Motion To Dismiss, Or In The Alternative, Motion To Affirm.

Intervenor, as grounds for his motions, argues that Appellant lacks standing to challenge the Act, that the appeal does not present a substantial federal question, and that the Act contains adequate due process safeguards to protect Appellant's rights and interests. Intervenor's motion should be denied as Appellant will demonstrate below.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourteenth Amendment, Section 1, United States Constitution; Section 18, Bill of Rights, Kansas Constitution; Kansas Statutes Annotated, Section 40-3401, *et seq.* (1981).

The above-mentioned constitutional provisions, and pertinent portions of the statutes were reproduced in the Appendix to Intervenor-Appellee's Motion To Dismiss, Or In The Alternative, Motion To Affirm, and thus, Appellant will not include them in the Appendix to his brief.

ARGUMENT OPPOSING MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION TO AFFIRM

A. Appellant Has Standing To Challenge The Act.

Standing is a question of whether a party has alleged such a personal stake in the outcome of the controversy as to warrant the invocation of jurisdiction and to justify

the exercise of the Court's remedial powers on his behalf. *Warth v. Seldin,* 422 U.S. 490, 45 L.Ed.2d 343, 95 S. Ct. 2197 (1975). This Court has stated that, in its constitutional dimension, standing imparts justiciability: whether the plaintiff has made out a case or controversy between himself and the defendant within the meaning of Article III of the U.S. Constitution. This is the threshold question in every federal case determining the power of the Court to entertain the suit. *Warth v. Seldin,* 422 U.S. at 498.

Standing requires the coexistence of three factors: (1) injury in fact to the party; (2) "individuated" injury; and (3) causation in fact. *Duke Power Co. v. Carolina Env. Study Group,* 438 U.S. 59, 57 L.Ed.2d 595, 98 S. Ct. 2620 (1978). There can be no doubt that Appellant has sustained injury in fact. Settlement of the malpractice suit initiated against him has resulted in increased malpractice insurance premiums and a 400% increase in surcharges which the Kansas Health Care Stabilization Fund ("the Fund") has collected from Appellant since 1984. Surcharges are in direct proportion to a physician's medical malpractice insurance premium. Appellant has felt the affects of the act individually, and not merely as a member of the class of Kansas physicians. As such, Appellant has suffered a distinct and palpable injury satisfying the first and second elements of the test for standing.

The final element necessary for standing is causation. "Standing to sue" means that a party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy. *Dutoit v. Board of Johnson County Comm'rs,* 233 Kan. 995, 667 P.2d 879 (1983). Thus, to have standing, Appellant must show that he suf-

fered some injury and that there was some causal connection between the claimed injury and the challenged conduct. Appellant argued in the Kansas Supreme Court, and reiterates his argument here, that "but for" the Act, he would have had an opportunity to defend himself and present his defense to the alleged malpractice in a Court of law. The element of causation is satisfied due to the fact that injury to the Appellant would not have occurred "but for" the Act. *Duke Power Co. v. Carolina Env. Study Group,* 438 U.S. 59, 57 L.Ed.2d 595, 98 St. Ct. 2620 (1978). In the absence of the Act, Appellant's insurance carrier would have been obligated to defend him in Court since the potential liability for the injuries claimed by Plaintiffs in the action below, greatly exceeded Appellant's policy limits. However, the Act allowed the Fund to settle the claim, so that no further litigation could possibly occur. Thus, "but for" the Act, a substantial claim against Appellant would have afforded him an opportunity to defend himself in Court. The direct affect of the Act is to completely deny Appellant the opportunity to present any defense to any alleged malpractice.

The Kansas Supreme Court determined that Appellant had standing to challenge the Act. While the conclusion is not binding on this Court, the Court should independently find that Appellant has standing on the same grounds. Under the factual circumstances presented, Appellant has a sufficient stake in a justiciable controversy to obtain judicial resolution of the controversy.

B. This Appeal Presents A Substantial Federal Question.

Appellant's claim that the Kansas Health Care Provider Insurance Act violates the Fourteenth Amendment due process clause to the United States Constitution raises

a substantial federal question. The Kansas Supreme Court has expressly rejected Appellant's federal constitutional claim in holding that the provisions of the Act do not deprive a health care provider of a property right, i.e., the right to defend an action, or a due process right. The Kansas Supreme Court concluded that the Act did not violate the Fourteenth Amendment to the U.S. Constitution or Section 18 of the Bill of Rights of the Kansas Constitution.

While an appeal of a State Court's application of state law does not raise a substantial federal question, an appeal of a State Court's application of federal law does raise a federal question. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 53 L.Ed. 2d 965, 97 S. Ct. 2849 (1977).

As was more fully elaborated in Appellant's Jurisdictional Statement, the Act completely severs a physician's right to have a meaningful hearing to defend a malpractice claim against him. The Act takes "property" from the physician that he is otherwise guaranteed by the Fourteenth Amendment to the United States Constitution and the Constitution of the State of Kansas, Bill of Rights, Section 18. Minimum procedural requirements are a matter of federal law. While the state may freely legislate regarding substantive issues, federal procedural requirements are inviolate. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 1 L.Ed.2d 265, 102 S. Ct. 1148 (1982). Thus, this appeal raises a substantial federal question.

C. The Act Does Not Contain Adequate Due Process Safeguards.

In order to determine whether the Act contains adequate due process safeguards, it is necessary to determine what "process" is due under the circumstances. As Intervenor correctly notes, the cornerstones of due process are notice of the charges against one and an opportunity to be heard at a meaningful time in a meaningful manner. As this Court has noted previously, the precise process which is required is based on a balancing of numerous factors. In *Mathews v. Eldridge,* 424 U.S. 319, 47 L.Ed. 2d 18, 96 S. Ct. 893 (1976), this Court stated:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and finally, the Governments interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. 424 U.S. at 334, 335.

The private interest of Appellant affected is compelling; it is the right to defend oneself in Court. The deprivation through the process accorded is total. The process does simply not allow objecting physicians to have a voice in defending a cause of action under the circumstances. Appellant acknowledges there is great public interest in resolving malpractice claims, compensating those truly injured, and in alleviating administrative burdens on the Court created by litigation. However, in disputed cases

litigation itself acts to protect the public interest in having fund monies paid out only to those who are actual malpractice victims. Under the test in *Mathews*, procedural due process has not been accorded to Appellant. The Act's process only afforded Appellant the opportunity to object for the record, rather than allowing him to be heard in a meaningful way.

In analyzing the competing interests and evaluating the procedural protections of the Act, it is important to note that any proposed settlement between a claimant and the Fund must be given Court approval, after a hearing, upon a finding that the settlement is valid, just and equitable. K.S.A. § 40-3401. The health care provider is afforded notice of the hearing and is permitted to appear and be heard. Intervenor points out in his Motion To Dismiss that Appellant took advantage of these procedural safeguards, but that the settlement was approved over his objection. Intervenor fails to disclose to the Court that the only mention of Appellant's objection to the settlement was a one line statement by his insurance carrier's attorney who stated "For the record, Dr. Long does not approve of the settlement and in fact personally objects to same." The District Court Judge did not address even one single question to Appellant. In addition, the "notice of hearing" which Appellant received was in the nature of fifteen hours prior to the hearing. The alleged due process safeguards which Intervenor claims have been afforded to Appellant, were not, and are not adequate to protect the individual's interest under the due process clause of the Fourteenth Amendment.

In its zeal to protect Kansas citizens, and to provide them with "health and welfare", the Kansas Legislature

has damaged an equally worthy objective, that of providing justice for its health care providers.

CONCLUSION

In summation, this appeal should not be dismissed because Appellant has standing to challenge the Act, the appeal presents a substantial federal question, and the decision of the Kansas Supreme Court rests on an adequate non-federal basis. In addition, this appeal should not be affirmed as the decision of the Kansas Supreme Court was incorrect, in that the Act does not contain procedural safeguards sufficient to satisfy the due process clause of the Fourteenth Amendment of the United States Constitution. Accordingly, Intervenor's Motion To Dismiss, Or In The Alternative, Motion To Affirm should be denied.

Respectfully submitted,

JEFFERY A. MASON, ESQ.
Counsel of Record
VIGNERY AND MASON
214 E. 10th Street
P.O. Box 767
Goodland, Kansas 67735
(913) 899-6588

LAURIN D. QUIAT, ESQ.
COGSWELL AND WEHRLE
Stanford Place 3, Suite 900
4582 South Ulster Street
Denver, Colorado 80237
(303) 773-8899

Attorneys for Appellant,
Lloyd O. Long, M.D.